

LANE COUNTY AUDUBON SOCIETY

IBLA 80-225

Decided June 11, 1981

Appeal from decision of the District Manager, Eugene, Oregon, Bureau of Land Management, dismissing protest against timber sale (tract E-80-37).

Affirmed.

1. Administrative Procedure: Generally -- Regulations: Force and Effect as Law -- Timber Sales and Disposals  
Guidelines issued under BLM Manual sec. 1791 relating to preparation of an environmental analysis record with regard to a proposed timber sale are not the type of material required by 5 U.S.C. § 552(a)(1)(D) to be published in the Federal Register and as such are not binding on BLM.

2. Timber Sales and Disposals

A decision by a BLM district office to proceed with a proposed timber sale which was made after consideration of all relevant factors and which is supported by the record will not be set aside in the absence of a showing that the decision is clearly in error.

APPEARANCES: John E. Bonine, Esq., and Steven Pfeiffer, Eugene, Oregon, for appellant; Eugene A. Briggs, Esq., Office of the Solicitor, Portland, Oregon, for the Bureau of Land Management; H. G. Scherffius, Springfield, Oregon, for intervenor Rosboro Lumber Company; Martin Devere, Eugene, Oregon, for amicus curiae North West Timber Association.

## OPINION BY ADMINISTRATIVE JUDGE HARRIS

On October 12, 1979, the Lane County Audubon Society (LCAS) filed a letter of protest with the District Manager, Bureau of Land Management (BLM), Eugene, Oregon, regarding a proposed timber sale with respect to tract E-80-37 situated in secs. 23 and 27, T. 21 S., R. 3 W., Willamette meridian, Lane County, Oregon. <sup>1/</sup> The basis for the protest was listed as "water quality, buffers." In a November 15, 1979, letter LCAS provided additional comments objecting to the proposed sale on the basis that no arrangement for a third "landing" had been made and old growth trees, "in short supply" and "important in the riparian zone," would be removed.

On November 29, 1979, Rosboro Lumber Company was declared the high bidder for tract E-80-37 at the Eugene District's timber sale. By letter decision of that date, the District Manager, BLM, informed LCAS of his intention to award the contract to the high bidder pending resolution of any appeal from his decision. In addition, he responded to LCAS's objections, as follows:

The issues that you raised concerning this tract in your letter of October 12, 1979, were the removal of large, old-growth timber from the buffer zone along the main and north forks of Piper Creek and the effect that this removal would have on the quality of the water in the streams.

We considered your input during sale preparation but decided that, for this particular tract, the 14 old-growth trees should be removed from the streamside buffer. It is our opinion that these trees would endanger the safety of the logging crew during the yarding process if left standing. Although skyline logging will be required, the yarding profiles indicate that the suspended logs and movement of cables could break limbs and tops from these larger trees or pull them over, thus sending material into the work area. Therefore, these trees will be removed to provide clear yarding roads through the buffer.

The 80 to 100-foot buffer of hardwoods, cedar, and small Douglas-fir and hemlock should provide a filter to reduce sedimentation of the streams and to preserve water quality. Suspension of logs during yarding, directional falling and leaving cull material in place should reduce

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<sup>1/</sup> The subject land is Oregon and California (O & C) revested land committed to "permanent forest production" by section 1 of the Act of Aug. 28, 1937 (O & C Act), 43 U.S.C. § 1181a (1976).

soil disturbance and prevent excessive stream sedimentation.

LCAS has appealed from this letter decision.

In documents submitted in support of its appeal, appellant indicates that it is concerned only with unit 1 of tract E-80-37, containing 30 acres of land intended for clearcutting. Appellant argues that the land is traversed by the north and south forks of Piper Creek, a class 1 stream which is valuable for domestic use, "angling or other recreation" and as "spawning, rearing or migration routes" for significant numbers of fish. It also asserts that the area is valuable for wildlife habitat in areas of old growth timber and in riparian zones. Stands of old growth timber are described as "unique habitat which is essential to many wildlife species" and the riparian zones are considered "representative of what is widely recognized as the most important of all habitat forms for the greatest number of species." Appellant argues that clearcutting and attendant soil erosion would "irreparably erode or destroy" these resource values. Appellant characterizes the area as a "uniquely vulnerable ecosystem." It maintains that the soils are highly susceptible to disruption because they are rocky, have a 20 to 60 percent slope and pose significant problems for reforestation. It states that the results of disturbance of this land would be the destruction of wildlife habitat, an impairment of water quality through sedimentation, and a decrease in timber productivity.

Appellant contends that the Supplemental Environmental Assessment Record (SEAR), prepared by BLM in April and May 1979 to assess the environmental impact of the timber sale with respect to tract E-80-37, failed "to meet the Bureau's own environmental analysis requirements [BLM Manual section 1791] as designed to assure conformance with the BLM's statutory NEPA [National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1976)] mandate." Appellant argues that BLM failed adequately (1) to describe, analyze, and quantify the potential for soil erosion, the threat to wildlife habitat and water quality, and to consider "residual" and "cumulative" impacts of timber cutting; (2) to justify rejection of alternative methods of timber cutting and mitigating measures vis a vis those adopted; (3) to assess environmental impacts on a site specific basis; and (4) to follow the "Guidelines for Clear-cutting on Federal Timberlands" abstracted from a report entitled "Clear-cutting on Federal Lands" prepared by the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, U.S. Senate, in March 1972. Appellant requests that "a new SEAR be prepared fully complying with the applicable laws and regulations."

[1] The SEAR prepared prior to the sale of timber on tract E-80-37 served as the record of environmental analysis precedent to the threshold determination whether a full environmental impact statement

(EIS) should be prepared pursuant to NEPA, *supra*. See Elaine Mikels, 44 IBLA 51 (1979). In preparing such a document, BLM is obligated to develop a reviewable record reflecting consideration of "all relevant factors." See Hanly v. Mitchell, 460 F.2d 640, 648 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

Appellant argues, citing Gulf States Manufacturers, Inc. v. NLRB, 579 F.2d 1298 (5th Cir. 1978), that BLM must comply with its own "procedural rules," as set out in BLM Manual section 1791, 2/ regarding preparation of an environmental assessment record.

Initially, we will deal with the question whether the contents of BLM Manual section 1791 constitute rules which are binding on BLM. The court in Gulf States held that a provision in the "Case Handling Manual" of the National Labor Relations Board (NLRB) was "binding" on the NLRB, even though considered one of "its own internal procedures" and even though it was not published in the Federal Register. Gulf States Manufacturers, Inc. v. NLRB, *supra* at 1308-09. The basis for this holding was the court's interpretation of a 1967 addition to the Administrative Procedure Act (APA), 5 U.S.C. § 552(a)(1) (1976), which provides: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." The court stated that "[i]t was not material whether the regulation was substantive or procedural" in order to bind the Board, so long as its nonobservance adversely affected the company in this case. Gulf States Manufacturers, Inc. v. NLRB, *supra* at 1309. The court held that the NLRB had violated its own internal procedures and that such violation adversely affected the rights of the company. Id.

The key to the decision in Gulf States, however, is that the material must deal with a "matter required to be published in the Federal Register." 5 U.S.C. § 552(a)(1) (1976). The relevant items required to be published under the APA are the following: "[S]ubstantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D) (1976).

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2/ In BLM Release 1-1211 dated June 5, 1980, the Associate Director, BLM, stated:

"On June 11, 1979, the Secretary decided that the Bureaus should have no Manual guidance dealing with compliance with the National Environmental Policy Act of 1969 (NEPA). Therefore, we are removing all Manual Sections in the 1790 series and are not replacing them. Refer to 516 DM for Departmental guidance on NEPA implementation."

The question whether a manual provision is actually an item requiring publication is answered by looking at the content of the provision and the intent of the agency as ascertained by extrinsic evidence. See Brown v. Lynn, 392 F. Supp. 559 (N.D. Ill. 1975); see also Piccone v. United States, 407 F.2d 866, 876 (Ct. Cl. 1969) (Judge Nichols concurring). It seems quite evident that a manual provision which imposes a specific obligation upon members of the public must be published. <sup>3/</sup> However, the question is more difficult in the context of a manual provision which allegedly deals with the internal operating procedures of an agency.

In Hogg v. United States, supra at 280, the court stated that "the requirement for publication [under 5 U.S.C. § 552 (1976)] attaches only to matters which if not published would adversely affect a member of the public." The requirement was held not to apply to internal delegations of authority by the Attorney General respecting the conduct of litigation. In Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 38 (3rd Cir. 1976), the court held that soil conservation service project evaluation manuals did "not prescribe any rule of law binding on the agency." The court observed that the manuals provided for flexibility in the use of watershed procedures. See also Brown v. Lynn, supra at 562; Brennan v. Ace Hardware Corp., 495 F.2d 368, 376 (8th Cir. 1974).

However, in Morton v. Ruiz, 415 U.S. 199, 235 (1974) (cited in Gulf States Manufacturers, Inc. v. NLRB, supra at 1309), the Court considered a Bureau of Indian Affairs (BIA) Manual provision limiting general assistance eligibility to those Indians living "on reservations." The Court held that even assuming the Secretary had the power to make such a limitation, it had not been validly accomplished. Id. at 230-38. Moreover, the Court stated that BIA failed to comply with its own internal procedures in that the limitation was clearly a substantive policy within the class of directives that the Manual itself indicated were to be published. Id. at 235.

In Elaine Mikels, supra, we characterized the provisions of BLM Manual section 1791 as "guidelines." They are not the type of material required by 5 U.S.C. § 552(a)(1)(D) (1976) to be published in the

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<sup>3/</sup> In interpreting the APA provision regarding publication, 5 U.S.C. § 552(a)(1)(D) (1976), the court in Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977), held that information "imposing specific obligations upon outside interests in mandatory terms" must "be published in the Federal Register in its entirety, or, in the alternative \* \* \* be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register. 5 U.S.C. § 522(a)(1)." See also Hogg v. United States, 428 F.2d 274 (6th Cir. 1970), cert. denied, 401 U.S. 910 (1971).

the Federal Register. They do not prescribe any rule of law binding on BLM. They are not intended and were not written to require strict conformance with their terms. Rather, they permit a flexible approach in the preparation of environmental analyses, considering a multitude of variable factors. The present case is distinguishable from Gulf States Manufacturers, Inc. v. NLRB, supra. In that case the NLRB failed to comply with internal procedures required to be published in the Federal Register. In this case we find that BLM complied with the section 1791 guidelines and that such guidelines were not required to be published in the Federal Register. The ultimate safeguard to ensure adequate consideration of the environmental factors at stake in a timber sale is not the BLM Manual but the judicially enunciated doctrine in Hanly v. Mitchell, supra, which requires taking into account all relevant factors.

[2] After a careful review of the record in this case we believe that there is ample evidence that BLM gave consideration to all relevant factors. Based on reports by BLM specialists, the SEAR described the existing environment, the anticipated adverse effects of logging on the environment, possible mitigating measures, and recommendations for mitigation.

Regarding soil erosion and stream sedimentation, BLM states in the SEAR that "[s]ome soil erosion and stream siltation will occur from road construction and logging operations" and will continue "until new road construction and bare land stabilizes" (SEAR at 5-6). In a report, attached to the SEAR and prepared by Linda Forest, a BLM soil scientist, soil types in unit 1 are mapped and a portion of the unit with Ritner series soil is noted as a "problem." She also recommended that the area of rock and rocky soils not be burned "so [as] not to remove the organic matter from the surface soils," thereby protecting its water-holding capacity.

Appellant points to the Forest report as evidence of the soil fragility in the sale area. Appellant also indicates that certain BLM documents support the soil fragility finding (Appellant's Reply Brief at 3-4). However, as pointed out by BLM, the SEAR and attached documents served their purpose in that the BLM decision makers were informed that the Ritner soils should be protected and the sales plan was modified accordingly (BLM's Reply Brief at 3). 4/

BLM states in the SEAR that the area will be "difficult to reforest because of grass, heat, drought, and rocky soils" (SEAR at 5). Unit 1 is generally described as having a "fair chance of success for

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4/ The clearcut area in Unit 1 was reduced from approximately 34 acres to 30 acres. (See BLM Brief at 7.)

reforestation" (SEAR at 1). In a report prepared by BLM forest management personnel, and attached to the SEAR, the probability of successful regeneration within 5 years is noted as both yes and no. However, the report indicates that "[a]ll similar adjacent units have experienced problems needing replating and grass control." The report recommends spot burning on north slopes and ridge tops and no burning on south slopes. In an undated statement from Lori Osterstock, a BLM forester, which was attached to BLM's reply brief, it is stated that there is no evidence that the subject land is "highly susceptible to disruption," except for soils "adjacent to the creek (protected by vegetative buffer)." She further states:

Site very stable, minor sheet and rill erosion only disruption likely to occur, and the filter effect of the vegetation buffer is expected to keep stream turbidity to a minimum during the year it usually takes for ground vegetation to recover on the unit itself. i.e. No fish habitat ruin from sedimentation[;] No mass soil movement[;] No loss of site productivity \* \* \* Adjacent units cut [and] planted with NO buffers, creek not damaged and units reforested within 5 years. YES and NO response by silviculturist because a small, rocky area was considered part of unit -- this area subsequently excluded from unit area, thus an unqualified YES to reforestation. [Emphasis in original.]

The unstable soil "adjacent to the creek" is apparently the cobby dry Ritner series soil identified in the Forest report. This area is presumably partially excluded from clearcutting by designation as a riparian buffer. Furthermore, the "small, rocky area" excluded from the unit is apparently the rocky area identified in the Forest report in the northern portion of the unit (see n.4, supra).

It is indicated in the SEAR that "[w]ildlife cover, diversity, and foraging would be seriously altered for all species: ground, raptors, cavity dwellers, and branch foragers" (SEAR at 5, 7). In a report, attached to the SEAR, prepared by a BLM wildlife specialist, clearcutting and yarding timber through the Piper Creek riparian zone is noted as causing "potential heavy damage" with the "loss of snags, standing green trees, down logs [and] understory vegetation." The result would be "major population reductions of species already reduced to marginal levels \* \* \* due to extensive logging in past years." Road construction would also "effectively destroy wildlife habitat." The report recommends a 100-foot wide riparian buffer; a third landing so as to avoid yarding through the riparian zone; the rehabilitation of new roads; leaving large snags and old growth green trees along unit boundaries for wildlife; leaving unmerchantable trees unless they pose a hazard to low-flying helicopters; no gross yarding of cull material; and a possible spring burn. In a report attached to the SEAR prepared

by a BLM fisheries biologist, it is noted that Piper Creek is a class 1 stream. The report recommends a buffer of hardwoods and brush within 25 feet of the stream and the removal of "all new logging slash and limbs."

It is evident that BLM was well aware of the potential environmental problems which the subject timber sale would entail. Moreover, the record indicates that BLM considered measures of dealing with these problems, including those recommended by its area specialists. BLM provided for an 80- to 100-foot wide riparian buffer which would act not only to protect water quality but also wildlife habitat. 5/ BLM also provided for skyline logging so as to protect the riparian buffer. In this regard, the SEAR states:

This unit is planned to be skyline logged to the landing at the end of the new construction and to a landing on Piper Creek Road near the west edge of the unit. The second landing is needed so that a vegetative buffer of small cedar, W. hemlock, and maple can be yarded over with minimum damage. Any large old-growth Douglas-fir would be felled away from the riparian zone and the stream. This would eliminate the risk of having these large trees pulled over with no control during logging. All logs removed from the area north of the north fork of Piper Creek would be totally suspended over the stream and the vegetative buffer. All new logging debris would be removed from the streams.

(SEAR at 1). 6/ Furthermore, the SEAR indicates the efforts to be made to enhance reforestation:

The unit would be gross yarded. All material six inches in diameter and 12 feet in length and larger would be brought to and piled on the landing. Yarding would be done with at least one end of the log suspended clear of the ground. The bigleaf maple trees would not be cut. Ridge tops and north slopes would have the slash concentrations burned

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5/ In this respect, consideration appears also to have been given to the factors outlined in the Programmatic Environmental Analysis Record for Western Oregon (PEAR), dated April 1974, regarding the effectiveness of a riparian buffer (PEAR at 128).

6/ This decision to skyline log accomplishes the same goal as that sought to be achieved by the wildlife biologist's recommendation that a third landing be created, i.e., protection of the riparian zone. In addition, any damage associated with construction of a third landing is avoided.

for planting site preparation. The appropriate fire trails, burning plan, and smoke management plan would be developed for the unit. The unit would be planted with Douglas-fir seedlings during the planting season following site preparation.

(SEAR at 1).

We must emphasize at this point that the BLM decision on appellant's protest is an integral part of the administrative record before us. Elaine Mikels, *supra* at 54-55. It is not a "post hoc rationalization" as set out in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971), cited by appellant. Along with the SEAR it forms the basis on which BLM acted and it may be considered in determining whether BLM has given consideration to all relevant factors. Accordingly, appellant's reliance on the argument (Appellant's Brief at 24-25) that "[t]he rationale [for removal of old growth timber and for the width of the riparian buffer] must be presented and supported in the SEAR itself as an assurance that such mitigation measures received more than a cursory consideration in the decision to cut the Piper Creek unit as proposed" is misplaced.

Appellant also contends that BLM did not engage in site specific analysis, as required by State of California v. Bergland, 483 F. Supp. 465, 483 (N.D. Ill. 1980), and NRDC v. Morton, 388 F. Supp. 829, 838-40 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976). While those cases deal with preparation of an EIS, it is true that BLM must consider environmental factors in the preparation of an EAR at a certain level of specificity in order to insure that it has considered "all relevant factors." BLM has done so in this case. Similarly, we find that BLM acted to quantify environmental factors in general terms such that the BLM decision makers could make an informed judgment concerning the impacts of the proposed sale.

Appellant urges that BLM should have prepared a "worst case analysis" pursuant to the Council on Environmental Quality's regulation, 40 CFR 1502.22(b). That requirement, however, is applicable to preparation of an EIS, not to preparation of a SEAR.

Appellant further complained that BLM did not give adequate consideration to alternatives to the adopted timber sale program, and that it failed to consider all reasonable mitigation measures. All the authorities cited by appellant in support of these arguments relate specifically to preparing an EIS. There is a clear distinction between an environmental assessments and an EIS. 40 CFR 1501.3 and 1501.4. Despite that fact, the record supports a finding that BLM gave adequate consideration to alternatives and mitigating measures.

Finally, we must consider the effect of the "Guidelines for Clearcutting," cited by appellant. These guidelines were included in the

"Final EIS for BLM Timber Management for Western Oregon" (EIS at IV-3, XI-126) prepared in 1975, which the SEAR relied on (SEAR at 1). They were formally adopted by BLM on April 14, 1972, and implemented in "Timber Production Capability Classification" (TPCC) guidelines adopted on February 7, 1974. See BLM Manual section 5250. 7/

Appellant argues that BLM failed to apply these clearcutting guidelines and that, in any case, clearcutting is "precluded" because the prerequisites outlined by the guidelines have not been met. The record does not support appellant's argument. Considering the mitigating measures adopted by BLM, including the elimination of certain acreage in Unit 1 from clearcutting, we cannot find any violation of the clearcutting guidelines. Furthermore, BLM has made a determination that clearcutting is "silviculturally essential." This relates, as the guideline clearly states to "forest management objectives," thereby invoking the principles of management for "permanent forest production" under the O & C Act, supra. In this regard, the SEAR states:

Alternatives to the proposed action have been considered in preparing this assessment. Considering the desired site preparation for reforestation, soil characteristics, and watershed protection, the recommended logging plan would give the best results.

With regard to partial or selective cutting alternatives, these methods would be inappropriate on areas of old-growth timber because of a multiplicity of reasons involving silviculture, difficulty of yarding, damage to reserve timber, necessity of additional roads, and the near impossibility of removing subsequent crops without destroying the conifer regeneration.

Other alternatives would be to delay harvest until a later time or take no action. These alternatives would

7/ The portions of the clearcutting guidelines cited by appellant provide: "2. Harvesting limitations

"Clear-cutting should not be used as a cutting method on Federal land areas where:

"a. Soil, slope or other watershed conditions are fragile and subject to major injury.

"b. There is no assurance that the area can be adequately restocked within five years after harvest.

\* \* \* \* \*

"3. Clear-cutting should be used only where:

"a. It is determined to be silviculturally essential to accomplish the relevant forest management objectives."

necessarily require the harvest of an equivalent amount of timber elsewhere in order to meet the Master Unit's allowable cut. The Bureau policy dictates that BLM lands be managed for maximum yield commensurate with multiple use and environmental considerations (see PEAR, pages 1 and 2).

(SEAR at 3).

Above all, it was incumbent upon appellant to make a showing that the BLM decision was "clearly in error," i.e., that BLM failed to consider all relevant factors. Ernest J. Goertzen, 51 IBLA 196 (1980). While appellant's protest to the timber sale raised legitimate concerns, those concerns were addressed by BLM, and on appeal appellant has failed clearly to demonstrate that BLM either overlooked certain factors or improperly assessed the degree of seriousness of certain factors. Appellant's request that the case be remanded for preparation of a new SEAR is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris  
Administrative Judge

We concur:

Anne Poindexter Lewis  
Administrative Judge

Edward W. Stuebing  
Administrative Judge

